

OGC 73-2049

31 October 1973

MEMORANDUM FOR: Deputy Director of Medical Services

SUBJECT : Professional Liability

1. You have requested our views concerning the discussion of professional liability and the Federal Tort Claims Act in the 1969 HEW publication, An Administrative Guide for Federal Occupational Health Units by Dr. Arvo B. Ederma, returned herewith. You referred also to our comments to you in the same area in our memorandum of 19 October 1971 (OGC 71-1527).

2. As Dr. Ederma notes, even in those areas where personal liability on the part of the government employee exists, generally the claims are brought against the government rather than the employee personally. In fact, the expert in the Department of Justice advises that the Department has been able to persuade those claimants who have intended to proceed against employees to forego that right and to go forward with claims or lawsuits against the government only. For practical purposes therefore, it would seem that the government physician is well protected in this area. But it is also true, as Dr. Ederma points out, that claims arising outside the United States are not covered by the Tort Claims Act. Further, there could be a situation in which a claimant would elect to accept benefits available under the Federal Employees' Compensation Act, thereby forfeiting his right to sue the government but not losing his right to sue the physician. Whether these risks and the assistance and protection which could be expected to be forthcoming from the Agency in the event of a claim against an Agency physician warrant the purchase of malpractice insurance by your staff physicians would be a matter for judgment and decision by the individual physician.

3. In this connection, you will recall that in our memorandum of 19 October 1971 (OGC 71-1527) we suggested that in the final analysis the controlling factor in these cases likely would be the Agency's attitude. Mr. Houston in fact regarded it as inconceivable that a staff

OGC Has Reviewed

physician in the Agency, sued because of an action taken by him in the interest of the Agency, would not be fully backed and held harmless by the Agency. I know of no actions by the Agency contrary to the views expressed by Mr. Houston and indeed recent developments, I believe, fully support his statement. But it also occurs to me that any judgment or estimate of the attitude of the Agency in the future is at best a prediction. All concerned are familiar with the Agency's attitude and performance over the years as management has changed hands from time to time, but it would seem speculative to attempt to predict the attitudes and views of those who will be in charge of the Agency at some future date.

STATINTL

Associate General Counsel

Attachment

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